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WAR POWERS IN THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA.

INTRODUCTORY.

Between the federal systems of the United States of America and the Commonwealth of Australia there are many points of difference, as he who runs may see; but the elements of similarity are so notorious and so essential that a consideration of the war growth and war working of the Australian Constitution may not be without interest to American jurists.

The Commonwealth of Australia Constitution Act, 1900,[1] is in many ways remarkable. In form an ordinary enactment of the Imperial Parliament, it is really the refined product of years of co-ordinated Australian research. Long deliberation resulted in a definite choice. The constitution builders had before them the systems of Canada, of Switzerland, of the United States, and of Germany, and they chose the American system in preference to all others. That they have in many ways departed from their model is apparent to anyone who studies the two constitutions. The Constitution of the United States lays down a long list of private rights; it manifestly distrusts Congress; in the setting up of a non-parliamentary executive it definitely diverges from the British system of cabinet government. The Australian Constitution, on the other hand, clearly contemplates the cabinet system;[2] it says little of private rights; above all it is an imperial act, recalling the mind to the ultimate authority of the Crown. It is an agreement of the people and of the states, but it is not in form a popular declaration and ordainment as is the Constitution of the United States.

But despite this, the two constitutions are alike in great and important features. They are both federal in the truest sense;

[1] 63 & 64 Vict. c. 12.

[2] 63 & 64 Vict. c. 12, § 64.

they both confer specific functions on the federal body, while reserving the general residue to the states; there is, finally, a striking similarity of terminology which cannot fail to impress even the most casual reader.

This similarity has had important consequences in the interpretation of the Australian instrument. The Commonwealth High Court has taken judicial notice of the fact that one constitution is modeled largely on the other, and has accordingly given a very special weight and authority to the judicial decisions and doctrines that have grown up round the terms of that other. As Griffith, *C. J.*, said in delivering the judgment of the Court in *D'Emden* v. *Pedder*:[3]

> "When * * * we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation."

In accordance with this declaration, the High Court adopted the doctrine of the immunity of instrumentalities as laid down by Marshall, *C. J.*, in *M'Culloch* v. *Maryland*.[4] The historic controversy with the Privy Council resulted. In *Webb* v. *Outrim*,[5] we find Halsbury, *L. C.*, saying:

> "It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation."[6]

In *Baxter* v. *Commissioners of Taxation*,[7] the Australian Chief Justice vigorously replied, and it is submitted that his position has been substantially vindicated by certain *dicta* of Haldane, *L. C.*,

[3](1904) 1 Commw. L. R. 91, at p. 113.

[4](1819) 17 U. S. 316.

[5][1907] A. C. 81, at pp. 90-91.

[6]A. Berriedale Keith in his book "Responsible Government in the Dominions", Vol. 2, at page 835, criticizing the High Court attitude, says: "that a Constitution granted by the Imperial Parliament should be interpreted by the principles of the rigid Constitution of the United States is a result which legally is certainly unsound."

[7](1907) 4 Commw. L. R. 1087.

in delivering the judgment in the Colonial Sugar Company's case.[8] There is an important admission contained in the words:

> "In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada."

This question of similarity has far more than a merely academic interest; for on it will depend much constitutional law, and on account of it Australian war legislation and war interpretation become, to Americans, something more than the local doings of a distant state. The United States is now, like Australia, involved in a great world-war. Its constitutionalists are beginning to ask themselves how far the powers of their federal government are going to be sufficient. Australians have been asking this question for three years, and the answer provides some extremely interesting reading.

THE WAR POWERS.

The defence powers of the Commonwealth are found in several sections of the Constitution. The relevant ones are:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to:—" (*inter alia*)
>
> "(i) Trade and commerce with other countries and among the States:
>
> (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
>
> (xix) Naturalization and aliens:
>
> (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
>
> (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.
>
> 61. The executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, and

[8] Att'y.-Gen'l. *v.* Colonial Sugar Refining Co. [1914] A. C. 237, at p. 254.

> extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.
>
> 68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.
>
> 114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force * * *
>
> 119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

Upon these powers the Commonwealth has, during the present war, erected a considerable structure of legislation and regulation of an emergency character. Always recognized as having plenary authority within the ambit of its designated functions,[9] the present crisis has clearly shown two attributes possessed by the Commonwealth Parliament—its comparative immunity from imperial interference, and the immense superiority of commonwealth over state powers. In this connection Americans should remember that in the Australian federal system the Crown is an integral part, and the British Parliament can at any time extend the operation of its acts to Australia; and also that:

> "The State Parliaments indeed enjoy a position of independence unknown to the State Legislatures in the United States or to the Provincial Parliaments in Canada."[10]

The second feature, the independence of the states, has perhaps been thrown into shadow by the war necessity of a central controlling authority; the result, as will be shown, has been a substantial departure from the respect previously shown to states' reserved rights. So far as the other matter is concerned, a fact previously adverted to must be borne in mind; the Australian Constitution is an act of the British Parliament, dependent for its effective force on the legislative power of Great Britain. In the Constitution of the United States it is "THE PEOPLE" who "ordain and establish this Constitution". In other words the United States of America is a sovereign nation containing *in itself* full governmental powers; Australia is a Commonwealth whose powers are, and have repeatedly been declared to be, complete within the limits prescribed,

[9]Hodge *v.* The Queen (1883) 9 App. Cas. 117.

[10]Moore, Constitution of the Commonwealth (2nd ed.) 342.

but subject at all times to imperial legislation. The Commonwealth Parliament has been given a legislative function, but above it there always stands the British Parliament which is supreme, and whose laws are paramount.

For purposes of comparison, it may be noted that the defence or war powers of the United States government are contained in the provision making the President commander-in-chief, and the grant to Congress of powers—

> "To levy and collect taxes * * * to * * * provide for the common Defence and general Welfare of the United States; * * * To declare War * * *; To raise and support Armies * * *; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * * and, To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[11]

It will be seen then that the last clause, like section 51 (xxxix) of the Australian Constitution, provides for a certain incidental power; the importance and possible scope of this must be looked at in the next section.

War Emergency Legislation.

It might have been expected, in a war like the present which shakes the British Empire to its very foundations, that the war legislation of the Imperial Parliament would be given an imperial operation. But such is not the case. The British Defence of the Realm Acts (on which the Australian War Precautions Act 1914-1916,[12] is largely based) are of local operation merely. The colonies—such is the recognition accorded to their privileges of self-government—have been conceded the fullest discretion in the carry-

[11] United States Constitution, Art. 1, § 8.

[12] 14 Commw. Acts 134.

ing out of their war measures. From an enumeration of the defence powers of the Commonwealth, it will be readily seen that the Federal Parliament has a sharply defined province. On the one side, it may impinge on the imperial powers; on the other, it may come into conflict with those powers which are still the guarded privileges of each of the Australian states. Remembering this restriction of sphere, remembering in particular that the states, broadly speaking, retain control over their internal affairs and internal trade,[18] how very wide are the terms of the War Precautions Act 1914-1916, enacted by the Commonwealth Parliament. The citation of a few sections will show this clearly:

> "4.—(1.) The Governor-General may make regulations—
>
> (i.) for securing the public safety and the defence of the Commonwealth * * *"
>
> "(1. A.) The Governor-General may make regulations as he think desirable for the more effectual prosecution of the war, or the more effectual defence of the Commonwealth or of the realm, prescribing and regulating—" (*inter alia*)
>
> "(*b*) the condition (including times, places, and prices) of the disposal or use of any property goods articles or things of any kind * * *."

While in form the grant of power is to the Governor-General, this indicates no personal authority in the King's representative; it is committed to him as the constitutional head of the government and is exercised by the cabinet, which is thus given a comprehensive discretion in the making of regulations which may assist the public safety and the defence of the Commonwealth. In consequence, many regulations have been promulgated, dealing with a host of matters closely or distantly related to the ends stated. These will be considered in the next section, but the question which immediately suggests itself is this—"are there to be no limits to the defence power save those which the executive in its discretion may choose to invent? The public safety may be secured in many ways, social and industrial as well as military or naval; are these matters, then, in time of war, to be considered either a part of or 'incidental' to the powers conferred?"

[18]This is the true *discrimen* in The King *v.* Barger (1908) 6 Commw. L. R. 41 and Peterswald *v.* Bartley (1904) 1 Commw. L. R. 497.

Dr. Willoughby has an observation of importance at this stage. He says:[14]

> "The declaration in the Preamble that the new Union is established" (he is of course referring to the United States) "for the common defense and general welfare, and the grant by Article 1, Section 8, of the Constitution to Congress of the power 'to levy and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States,' has at times been argued to be equivalent to a grant to the General Government of all powers, the exercise of which may in any way contribute to the effectuation of either of these ends.
>
> * * * * * *
>
> It scarcely needs to be said that this interpretation has not been accepted by the courts. Were this view to be accepted the Government of the United States would at once cease to be one of enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced."

It would perhaps be scarcely justifiable to say that the opinion of things here dismissed by Dr. Willoughby has been arrived at in Australia; but how very nearly it has been approached is evidenced by the decisions of the High Court, more particularly in *Farey* v. *Burvett*.[15] This, and other decisions, will be looked at later.

As illustrations of other legislation of a war character passed by the Commonwealth Parliament, there may be mentioned the Trading with the Enemy Act 1914-1916,[16] the Enemy Contracts Annulment Act 1915,[17] which is largely, however, declaratory of the common law, the Daylight Saving Act 1916,[18] and the Unlawful Associations Act. 1916.[19] These last two mentioned are indexed in the current sessional volume of statutes as emergency acts passed under section 51 (vi) of the Constitution, and are curious examples of what things "defence" may cover. Daylight saving is a means to the end of national economy and efficiency, and as such may be reckoned a factor in the successful carrying on of national war. The Unlawful Associations Act 1916, creates a new crime, that of

[14] 1 Willoughby, Constitution, § 22.
[15] (1916) 21 Commw. L. R. 433.
[16] 14 Commw. Acts 107.
[17] 13 Commw. Acts 105.
[18] 14 Commw. Acts 76.
[19] 14 Commw. Acts 77.

advocating or encouraging, or inciting or instigating to the taking or endangering of human life, or the destruction or injury of property. The causes for its enactment are stated in the preamble:

> "Whereas an Association known as the Industrial Workers of the World and members thereof have been concerned in advocating and inciting * * *:
>
> And whereas it is expedient for the effective prosecution of the present war that laws shall be enacted for the suppression of such practices:"

I must here observe that the Commonwealth has no general power of criminal legislation; the protection of property, the control of production and domestic trade, and the maintenance of public order—these and all similar functions are part of the province of the states. The Commonwealth can probably only deal with offenses against some law passed in pursuance of one of its defined powers.[20] This new offense, then, is one of the offspring of the defence power. The readiness with which its legitimacy is accepted is emphasized by the fact that there were not wanting distinguished authorities in Parliament for the proposition that a War Precautions Act could have validly achieved the same end.[21]

Of the wide field covered by the War Precautions Act 1914-1916, and also of the possible range of matters incidental to those of the "naval and military defence" of the Commonwealth, these instances may serve as some illustration.

Commonwealth Regulations.

There is no more common phase of development in modern constitutional law than the delegation of powers to the executive. The validity of such a delegation is upheld in Australia, because the Commonwealth has plenary authority within the limits of its powers, and this includes a capacity of delegation.[22] The maxim *delegatus non potest delegare* has no application to a government which is itself no delegate.[23] The position may be different in

[20]"In my opinion the power of the Commonwealth Parliament to enact criminal laws is to be found in pl. xxxix. and nowhere else, and is a power to enact them as sanctions to secure the observance of substantive laws with respect to matters within the legislative, administrative, or judicial power of the Commonwealth, and in that sense incidental to the execution of such powers." The King *v.* Kidman (1915) 20 Commw. L. R. 425, *per* Griffith, *C. J.*, at p. 434.

[21]Federal Hansard 10121, 10145.

[22]Hodge *v.* The Queen, *supra*, footnote 9.

[23]Baxter *v.* Ah Way (1909) 8 Commw. L. R. 626.

America, for there it is "WE, THE PEOPLE of the United States * * * do ordain and establish this Constitution for the United States of America." The people, the legal sovereigns, have constituted a delegate body, and it may therefore be that that delegate cannot in turn delegate to any other body or authority. But the Australian Commonwealth Parliament, being no delegate, may and does hand over to the executive a certain legislative power. This handing over has been substantial during the present war; under the War Precautions Act 1914-1916, as we have seen, the executive has been given practically a free discretion in the devising of new modes of protecting the public safety of the Commonwealth. This fact of itself is notable, for it is characteristic of the Australian Constitution (as also of the American) that it provides for a division of powers; the spheres of the legislature, the executive and the judicature are clearly marked out;

> "it is impossible to avoid the conclusion that the separation of powers was intended to establish legal limitations on the powers of the organs of government, and that the Courts are required to address themselves to the problem of defining the function of those organs."[24]

But perhaps the most interesting feature is not the constitutionality of delegation *per se,* but the immense range of subjects upon which the delegated powers may be made operative. The bestowal on the executive of a power of decision over administrative details is one matter; the handing over to the executive of a virtual power of determination of the whole governmental policy is quite another. The validity of such a transfer might possibly be doubted in the American system,[25] but since *Lloyd* v. *Wallach*[26] and *Farey* v. *Burvett*[27] at any rate, it has come to be tacitly accepted as *intra vires* in Australia. It is perhaps the recollection that all these executive powers, however seemingly arbitrary, rest in the last resort on Parliamentary authorization (added to the constant responsibility of the executive under the cabinet system), that reconciles constitutionalists to the temporary disturbance of

[24]Moore, *op. cit.,* 96-97. "A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the Federal Government and of the States, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative, and judicial powers are to be vested in separate and independent organs of government." Willoughby, *op. cit.,* 1259.

[25]Field *v.* Clark (1892) 143 U. S. 649, 12 Sup. Ct. 495.

[26](1915) 20 Commw. L. R. 299.

[27]*Supra,* footnote 15.

the traditional constitutional balance. Be that as it may, the War Precautions Regulations contain some striking examples of what may conceivably, in a time of national peril, be related to the defence power.

"The competent naval or military authority * * * shall have right of access to any land or buildings or other property whatsoever."[28] Premises licensed for the sale of intoxicating liquor may be closed by the proper authorities in certain areas.[29] Inhabitants of any particular area may be ordered to leave that area.[30] "A person shall not converse with any other person by telephone in any other than the English language."[31] A censorship of the press is established.[32] The price of sugar is fixed.[33]

A moratorium both for civilians and soldiers has been established.[34] The use or sale of crude tar save by consent of the Minister is prohibited.[35] Restrictions and conditions are imposed on the registration of companies, firms or societies.[36] Enemy shareholders in companies have been compelled to transfer their shares to a public trustee.[37] Power is taken to prohibit the purchase or sale of hides in certain cases.[38] Contracts for the sale of any land to naturalized persons of enemy origin must not be entered into save by the consent of the Attorney-General.[39] Restrictions are placed on the acquisition of interests in mining ventures by persons other than natural-born British subjects.[40] A Prices Board is established, and on its recommendation the Minister may "determine the maximum prices which may be charged for foodstuffs and necessary commodities sold, and the maximum rates which may be charged for services the performance of which is commenced, in any proclaimed area".[41] For the rest, there are regulations concerning rabbit skins, sheep skins, tin plates, wool, the use

[28]W. P. R. 1915 (War Precautions Regulations 1915) No. 5.
[29]W. P. R. 1915 No. 12 (1).
[30]W. P. R. 1915 No. 15.
[31]W. P. R. 1915 No. 21A.
[32]W. P. R. 1915 No. 28.
[33]W. P. R. 1915 No. 49E.
[34]W. P. (Moratorium) R. 1916.
[35]W. P. (Coal Tar) R. 1916.
[36]W. P. (Companies) R. 1916.
[37]W. P. (Enemy Shareholders) R. 1916.
[38]W. P. (Hides) R. 1916.
[39]W. P. (Land Transfer) R. 1916.
[40]W. P. (Mining) R. 1916.
[41]W. P. (Prices) R. 1916, 13 (*a*).

in trade of such words as "Anzac";[42] actions for libel or slander by persons alleged to be enemy subjects are made contingent on certain consents;[43] the raising of patriotic funds is forbidden without the sanction of a State War Council.[44] In one case, consequent on the great coal strike of 1916, power was given to the Prime Minister to convene a compulsory conference of employers and employees.[45]

These illustrations show clearly enough to what very wide boundaries the new executive power of the Commonwealth extends. With the exception of the telephone (and possibly companies) none of the matters dealt with by the regulations cited are within the general competence of the Commonwealth legislature—they are all matters which have become related to defence by reason of the war and its emergencies. Again, matters which are in the ordinary course civil become clothed with a military character; the result is the widening of the area of jurisdiction of courts martial, and the abrogation (as in the regulation discussed in *Lloyd* v. *Wallach*[46]) of some of those rights of the subject which, though not expressed in the Australian Constitution as they are in that of the United States, are still the great common-law inheritance of each of the Australian states. War brings its own circumstances and its own peculiar necessities, and one of those necessities has been the power in some authority to control the thousand and one *minutiae* which may prove conducive to military success. The bare power of defence has attracted to itself, in the guise of "powers incidental", much that is not of itself military in character at all. As was said in *Ex parte Milligan*,[47] in discussing the war power of Congress:

> "It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success * * *.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise."

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[42]W. P. (Supplementary) R. 1916 No. 2.
[43]W. P. (Supplementary) R. 1916 No. 7.
[44]W. P. (Supplementary) R. 1916 No. 13.
[45]W. P. (Supplementary) R. 1916 No. 21.
[46]*Supra*, footnote 26.
[47](1866) 71 U. S. 2, at p. 139

It seems a reasonable thing to say that in Australia today the "auxiliary powers", the "powers incidental" to the naval and military defence of the Commonwealth, have extended into the domain of states' rights, and that the functions of the executive have become if anything more important than those of the body which delegated those functions to it.

JUDICIAL INTERPRETATION.

The whole question of the extent of the defence power was raised and discussed in *Farey* v. *Burvett*.[48] By a regulation made in pursuance of the War Precautions Act 1914-1916,[49] the retail price of bread and flour was fixed in certain proclaimed areas, this interference with the domestic powers of the states being justified as a means to the more effectual prosecution of the war. The validity of the regulation was attacked on three main grounds:

1. That "whatever the defence power may include which directly tends towards a successful prosecution of an existing war, it does not include all the powers the exercise of which may promote among citizens conduct which is conducive to what is called national efficiency."[50]

2. That extending the defence powers to include measures which are merely conducive to the naval and military defence of the Commonwealth in an indirect way is tantamount to the destroying of all constitutional limitations in time of peace as well as in time of war. "If in time of war it is within the power of the Parliament to fix prices of commodities because Parliament thinks that to do so is necessary for the defence of the Commonwealth, it is also within the power of Parliament in time of peace to fix prices if it thinks that in view of possible future war it is necessary for the defence of the Commonwealth to do so."[51]

3. That the reserved powers of the states must be respected, and the regulation of internal trade is their domain.

The Court (Griffith, *C. J.*, Barton, Isaacs, Higgins and Powers, *JJ.*, with Gavan Duffy and Rich, *JJ.*, dissenting) upheld the validity of the act and the regulation. In the opinions of the majority, great reliance is placed on the decision of Marshall, *C. J.*, in *M'Cul-*

[48] *Supra*, footnote 15.

[49] See also section 4 (1. A.) (*b*) of the act quoted at p. 6, *supra*.

[50] 21 Commw. L. R., at p. 435.

[51] At pp. 434-435.

loch v. *Maryland*.[52] Indeed, that decision, constantly adverted to as it has been by the High Court of Australia both in connection with the doctrine of the immunity of instrumentalities and the doctrine of implied powers, on this occasion received possibly its widest modern application. Griffith, *C. J.*, though normally considerate of state privileges, takes his stand at section 51 (vi) of the Australian Constitution and frankly applies Chief Justice Marshall's test:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[53]

He sees in the defence power a paramount power, over-riding state powers if they come in its way. To him "naval and military" are words of extension and not of limitation. The possibility of price-fixing being conducive to defence is all that he is concerned with; the "degree of its necessity" is a matter for Parliament to decide.

Barton, *J.*, also:—

> "To aid in supplying the food-needs of any part of the Empire outside Australia or of Australia herself may greatly assist that Empire's defence, especially, but not only, when that supply may be used for the feeding of armies of which at this moment Australia forms an active part."[54]

To Isaacs, *J.*,

> "The defence power * * * becomes the pivot of the Constitution, because it is the bulwark of the State.
>
> * * * * *
>
> The essential fact is that Australians are belligerents as well as citizens, and for the moment their character as belligerents is pre-eminent and must receive the first consideration."[55]

The Chief Justice, whose view of the meaning of "defence" is typical of that of the whole of the majority justices, defines that term as including,

> "all acts of such a kind as may be done in the United Kingdom, either under the authority of Parliament or

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[52] *Supra*, footnote 4.
[53] 17 U. S., at p. 421.
[54] 21 Commw. L. R., at p. 448.
[55] At pp. 453, 454.

> under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution.
>
> * * * * *
>
> It includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy."[56]

He thus adopts a wide interpretation of the defence powers; he recognizes also that acts may be included in "defence" in time of war which have no connection with defence in time of peace; he further refuses to enter into any enquiry as to the facts warranting the exercise of this branch of the legislative power.

The dissenting justices, Gavan Duffy and Rich, *JJ.*, construe the words "naval and military defence" much more strictly:

> "We venture to think that they extend to the raising, training and equipment of naval and military forces, to the maintenance, control, and use of such forces, to the supply of arms, ammunitions and other things necessary for naval and military operations, to all matters strictly ancillary to these purposes, and to nothing more."[57]

They deny the analogy with English conditions:

> "The words 'the public safety and the defence of the realm' " (as used in the English Royal Proclamations) "are very different from the words 'the naval and millitary defence of the Commonwealth': the one phrase clearly suggests defence by means of naval and military operations, while the other is as broad and general as could be devised for the purpose of embracing all means for securing the safety of the community."[58]

American students of Australian constitutional growth will be by now quite familiar with the sharp divergence in point of view between the senior judges of the High Court, Griffith, *C. J.*, and Barton, *J.*, and their immediate juniors, Isaacs and Higgins, *JJ.*[59] But, during a time of war at least, it would now appear that the former judges are prepared to look not so much at the rights

[56]At pp. 440, 441.

[57]At p. 465.

[58]At p. 466.

[59]*Cf.*, 2 A. Berriedale Keith, *op. cit.*, 840, commenting on the decision in The King *v.* Barger, *supra*, footnote 13, in which Isaacs and Higgins, *JJ.*,

and privileges of state powers as at the necessity for the centralizing in some authority of a comprehensive power to safeguard the public welfare in time of crisis. It may be added that some sanction for the view thus recently adopted by the High Court is found in the statement of Lord Parker in *The Zamora*.[60]

> "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undersirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."

One point of view which is suggested by the cases cited is this: that the defence power is *sui generis*—something different from the other powers in that it draws to itself all matters which the legislature and executive may choose to impute to defence. But clearly, however much necessity may enlarge these powers, they are also limited by necessity. In effect, any power which may be conducive to the safety of the realm or the good conduct of the war is, for the period of the war at least, a Commonwealth power. The English Defence of the Realm Act has not been without its able constitutional critics.[61] It is, therefore, a noteworthy fact that an act of like character has in Australia been passed by a Parliament, not of absolute and sovereign, but of definitely enumerated powers.

On the validity of the War Precautions Regulations the leading authority is now Wallach's case.[62]

Regulation 55 (1) of the War Precautions Regulations 1915 provides that:—

> "Where the minister has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war."

One Wallach, a naturalized person, was committed, and sued out

dissented from the judgment of Griffith, *C. J.*, O'Connor and Barton, *JJ.*, says: "The two dissenting judges * * * maintained that the true mode of viewing the question was not to assert the doctrine of implied prohibition, but to construe the powers granted to the Commonwealth in as full a manner as if the Commonwealth Parliament were that of a unitary state. The powers of the states were the residual power remaining after the powers of the Commonwealth had been ascertained, and the possibility of the misuse of a legislative power was no argument against its existence * * *."

[60][1916] 2 A. C. 77, at p. 107.

[61]See Baty and Morgan, War: Its Conduct and Legal Results, 112.

[62]*Supra*, footnote 26.

his writ of *habeas corpus,* the return to which by Lloyd, commandant of the military internment camp, stated that Wallach was detained under a warrant from the Minister of Defence reciting (in accordance with the regulation) that upon information furnished to him he had reason to believe and did believe that Wallach was disaffected or disloyal. The Supreme Court of Victoria considered this return insufficient, but the High Court on appeal reversed this decision.

In the Supreme Court of Victoria, Cussen, *J.,* dissenting, says:

> "I have come to the conclusion that it was intended by these Acts" (*i. e.,* the War Precaution Acts 1914-1915) "to make a full delegation to the Governor-General in Council of the powers of the Commonwealth with reference to the public safety and defence of the Commonwealth. This view is in the first place strongly indicated by the title of the Principal Act, which is 'An Act to enable the Governor-General to make Regulations and Orders for the Safety of the Commonwealth during the present state of War'.
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> * * * * *
>
> We are dealing with an Act referring to a state of war, and not a state of peace, and in such an Act one might expect that extraordinary powers would be conferred on representatives of the Executive Government."[63]

The High Court (Griffith, *C. J.,* Isaacs, Higgins, Gavan Duffy, Powers and Rich, *JJ.*) unanimously upheld the validity of the regulation. Higgins, *J.,* says:

> "In all countries and in all ages, it has often been found necessary to suspend or modify temporarily constitutional practices, and to commit extraordinary powers to persons in authority, in the supreme ordeal and grave peril of national war. The aphorism *Inter arma silent leges* is that of a Roman violator of the laws; but the laws of Rome on many occasions deliberately and organically committed extreme powers to dictators, in grave emergencies; and when the office of dictator had fallen into disuse, the Senate used to endow the consuls with similar powers under the *decretum extremum atque ultimum.*"[64]

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[63]Rex *v.* Lloyd, *Ex parte* Wallach [1915] Victorian L. R. 476, at pp. 485-486, 488.

[64]20 Commw. L. R., at pp. 309, 310.

The right of the Commonwealth Parliament to delegate powers to the executive is thus now firmly rooted in constitutional practice. The discretionary, even arbitrary power placed in the hands of the Minister is also vindicated in Wallach's case, for:—

> "Having regard to the nature and object of the power conferred upon the Minister and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it. If this be so, the only inquiry which could possibly be made by the Court on the return to the writ with respect to the statements in the warrant would be whether the Minister had in fact a belief arrived at in the manner I have indicated."[65]

It only remains to look very briefly at the question of interstate free trade—a question which is not directly related to the defence power, and which consequently is somewhat apart from the main thesis of this article, but which arose out of action taken by the States of New South Wales and Queensland as a consequence of war conditions. Section 92 of the Australian Constitution reads:

> "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

This section, couched in apparently plain and unequivocal language, had already provided (and possibly will yet provide) matter for litigation in the High Court. Since the outbreak of war, and largely on account of war legislation in the States of New South Wales and Queensland, there have been two most important decisions on the question.[66]

In *New South Wales* v. *Commonwealth*,[67] it was contended that the provisions of section 92 were violated by the Wheat Acquisition Act 1914, passed by the Parliament of New South Wales. Section 3 of this act provides that the Governor may by notification in the *Gazette* declare that any wheat therein described or referred to is acquired by His Majesty, and that upon such publication the wheat shall become the absolute property of His Majesty, *i. e.*, of

[65] 20 Commw. L. R., at p. 304, *per* Griffith, *C. J.*

[66] For previous considerations of section 92 see Fox *v.* Robbins (1909) 8 Commw. L. R. 115 and Rex *v.* Smithers (1912) 16 Commw. L. R. 99.

[67] (1915) 20 Commw. L. R. 54.

the Government of New South Wales which like other governments within the empire is personified by the Crown. Section 8 annuls contracts made in New South Wales prior to the act relating to the sale of New South Wales wheat to be delivered in the said state. The effect of these provisions, it was contended, was to hamper the freedom of interstate trade.[68]

The High Court held that the terms of section 92 were not violated, as the ownership, and with it the power of disposition, had passed to the Crown; there had been a mere transfer of rights from the individual to the Crown without any diminution of those rights.

> "The right to control such disposition is limited by sec. 92 of the Constitution. But that section has nothing to say to the question of title. The duration of the power of disposition, which depends upon title, is coextensive with the duration of the title itself, and ceases with it. There cannot therefore be any conflict between the law of title and the law of disposition, and a law which deprives a man of the ownership of property does not interfere with his power of disposition while owner. Sec. 92 may, therefore, so far as it relates to commerce, be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one state to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of goods the section ceases to have any operation so far as those goods are concerned.
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> When the wheat in New South Wales became the property of His Majesty, the Sovereign, as the new owner, had the exclusive right of disposing of it. If the Government desired to export it to another State they were free to do so. Whether they did or did not, their power of disposition was not interfered with."[69]

The states are thus confirmed in their power of expropriation or eminent domain; the argument that the individual is consequentially hampered in his freedom of trade falls to the ground, for, as the Court points out, ownership has passed to the state, and the new dominion, the state dominion, enjoys the protection previ-

[68]A great portion of the argument of this case centered on the problem whether the Interstate Commission was properly a "court" with judicial powers; this is omitted from the present consideration.

[69]20 Commw. L. R., at p. 68, *per* Griffith, *C. J.*

ously accorded to the dominion of the private owner. In this, the High Court Justices substantially concurred, and this, as *Duncan* v. *State of Queensland*[70] emphasizes, is the true *ratio decidendi.*

Duncan's case takes us a step further, and discovers what the Melbourne *Argus* of October 26, 1916, describes as "remarkable limitations" on the Constitution. The Meat Supply for Imperial Uses Act 1914, passed by the Queensland Parliament, provides (*inter alia*):

> Sec. 6 (1) "It is hereby declared that all stock and meat in any place in Queensland are and have become and shall remain subject to this Act, and shall be held for the purposes of and shall be kept for the disposal of His Majesty's Imperial Government in aid of the supplies for His Majesty's armies in the present war."
>
> Sec. 7 (1) "All persons whosoever, including the owners, consignors, consignees, shippers, vendors, and purchasers of stock and meat, and each of their agents * * * are hereby prohibited from selling, offering for sale, disposing of, forwarding, consigning, shipping, exporting, delivering, or in any manner whatsoever dealing with any stock or meat (whether the same is or is not actually appropriated to His Majesty by an order made under this Act), except only in pursuance of and under the directions and orders of the Chief Secretary."

One Laura Duncan applied for a permit to cross certain fat cattle over the border of the state; this was refused, and plaintiff brought an action contending that the act, being a total prohibition of export save in certain circumstances, was an infringement of section 92 of the Constitution.

Now a similar case on a similar act had come before the High Court not long before, and in *Foggitt, Jones & Co., Ltd.* v. *New South Wales,*[71] the Court (Griffith, *C. J.*, Barton, Isaacs and Rich, *JJ.*, Gavan Duffy, *J.*, doubting) had decided that in so far as the New South Wales Meat Supply for Imperial Uses Act 1915 purported to authorize the Government of New South Wales to prevent the export of stock by the owners thereof from that state to another state, it was an interference with the interstate trade and commerce and was therefore invalid as being an infringement of section 92 of the Constitution. In Duncan's case there is a

[70] (1916) 22 Commw. L. R. 556.
[71] (1916) 21 Commw. L. R. 357.

complete reversal of opinion, and the act complained of is held good. Barton and Isaacs, *JJ.*, dissented very strongly, the majority being constituted by Griffith, *C. J.*, Higgins, Gavan Duffy, Powers and Rich, *JJ.*

The difference in point of view seems to be this. The majority justices look at the complete power of the states to control the acquisition or disposal of property as recognized in the Wheat Acquisition case,[72] and consider this acquisition of meat by the Queensland Government to be in principle the same. The minority, on the other hand, say that this is clearly distinguishable from the Wheat Acquisition case, because here there is no transference of ownership from the individual to the state:

> "It is well to point out at this stage that the defendants did not before action acquire the cattle as owners.
>
> * * * * *
>
> it is made plain that until the making of an order * * * by the Chief Secretary or his Under-Secretary stock were not to cease to be the property of their then owners."[73]

This distinction once established, Barton and Isaacs, *JJ.*, regard this act as a prohibition of export that is absolutely at variance with the provisions of section 92; they support the decision in Foggitt, Jones' case. It is certainly difficult to disagree with Isaacs, *J.*, when he says that—

> "If the State can then forbid the export from Queensland of the commodity absolutely, it can do so conditionally, and that condition may be the payment of a sum of money—which in pre-federation days was called a tax."[74]

The whole decision is one of possibly far-reaching effects, and clearly represents the most advanced step yet taken by the Australian High Court away from the popularly accepted meaning of freedom of interstate trade.

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[72] *Supra*, footnote 67.

[73] 22 Commw. L. R., at pp. 583, 585, *per* Barton, *J.*

[74] 22 Commw. L. R., at p. 617.